Nos. 81-2245, 81-2276, and 82-38

Office-Supreme Court, U.S.
FILED
APR 8 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEVADA,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.
and
TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,
v.
UNITED STATES OF AMERICA and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.
and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,
v.
TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

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1. The Adversity of the Project and the Reservation

The United States and the Tribe rely heavily upon an alleged absence of adversity under the pleadings in this case.[1] But as the United States concedes, adversity need

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[1] U.S. 21-22, 29-33; Tribe 2, 12-25. As used herein, "Tribe" followed by a page reference refers to the Tribe's red-covered brief

not come about by way of *pleadings*.[2] Putting aside our argument that in an all-inclusive, quiet title, water rights adjudication, every claimant is adverse to the other, the question even under our opponents' formulation becomes: was something done in the case that put everyone on notice that every claim, no matter how denominated, was adverse to every other claim? In response, the United States contends that it "did not file pleadings *or otherwise manifest an intent* that the two claims it was asserting [for the Reservation and the Project] were being presented as adverse to one another," and therefore no adversity was established "on the pleadings *or otherwise*". U.S. 33; emphasis added. This is simply wrong.

As early as 1926, the United States approved the Temporary Restraining Order ("TRO") in *Orr Ditch* that *specifically listed the Newlands Project and the Pyramid Lake Reservation as adversaries.* This same designation was carried forward to the Final Decree. The United States concedes that there was adverseness under the pleadings among all co-defendants in the case.[3]

We have appended to this Brief portions of the TRO and the Final Decree that demonstrate this point—a point which has heretofore been overlooked by all parties to this

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filed in Nos. 81-2245, 81-2276 and 82-38. "U.S." refers to the only brief on the merits filed by the United States in these cases. "JA" refers to the Joint Appendix filed by the parties in all three cases; "Nev. App." refers to the Appendix to Nevada's Petition for a Writ of Certiorari in No. 81-2245.

[2] The United States asserts, for example, that even in the absence of formal pleadings, "some form of notice—if only in the complaint, the governing statute, or prior decisions—" must be given that rights are being adjudicated *inter se*. U.S. 32; *see also* Tribe 23.

[3] *E.g.*, "* * * there *was* adverseness under the pleadings among the co-defendants in *Orr Ditch* by virtue of the district court's order in 1918 deeming the defendants' responses to the United States' complaint to be directed to co-defendants as well." U.S. 31; emphasis in original.

case. *See* Appendices A-B. In both the TRO and the Final Decree, the United States is listed as the plaintiff *and* as a defendant. Where the United States appears as a defendant, the Reservation and the Project are each named in brackets along with the others for whose benefit the United States was obtaining specific water quantifications.[4] So that there could be no mistake as to its intent, the *Orr Ditch* court decreed in both the TRO and the Final Decree that "all persons herein named as owners, grantors and successors be made and considered parties to this action * * *." *See* App. A 2a, App. B 4a. The United States did not contest or appeal this ruling, even though it gave close review to the TRO and the Final Decree during extensive hearings on both. *See* Nev. App. 185a, 187a.

Thus, the Reservation and the Project were clearly identified as adversaries at least as early as 1926 and remained so for the next 18 years. They were so designated in the Final Decree, and the United States and the Tribe cannot now be heard to deny that this Final Decree precludes them from litigating issues which were or could have been litigated in *Orr Ditch*.[5]

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[4] In addition, the Reservation was separately listed among the defendants, followed by the "United States." *See* App. A 1a, App. B 3a.

[5] Of course, these listings—as persuasive as they are—are not essential. In this respect, we agree with the Tribe that "[b]y their very nature, water adjudication suits provide all parties with notice that all interlocking water claims that are put forward are adverse, or at least potentially adverse, to each other. In these circumstances, the role of the pleadings is secondary. The adversity requirement is satisfied if the proceedings provide an opportunity for litigating the correctness of all of the claims that are asserted in the litigation." Tribe 22-23. The Tribe admits, in effect, that it is here trying to carve out an exception applicable only to this case.

2. "Reallocation" by the United States

The foregoing also defeats the contention of the United States that this case involves no more than "a reallocation of the water decreed in *Orr Ditch* to a single party—the United States." U.S. 21. The water rights represented by the Government were clearly distinguished, and the Reservation and the Project were treated as adversaries.

But we need not rely upon a listing of the parties to demonstrate the absurdity of the "reallocation" argument. As the Tribe candidly admits, "[t]he real conflict is and always has been between the Tribe and TCID. * * * [T]he Tribe's fishery water right with its earlier priority * * * first would be satisfied out of the Newlands Project's entitlement." Tribe 15, 16.[6]

The United States was not awarded a single *res* in *Orr Ditch* with which it could do as it pleased. It did not even seek water for its own use. Instead, in Claims 1 and 2, precise water duties were awarded for the irrigation of Reservation bottom and bench lands. Nev. App. 57a-58a. The Decree twice provided that this water was allowed "for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to * * * others than the Indians * * *." *Id.* Both the TRO and Final Decree were careful to distinguish between what had belonged to the United States prior to 1859 and what became reserved to the Indians pursuant to *Winters*.[7]

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[6] One wonders why, if the United States has owned the Newlands water all along, it must now sue TCID in order to divert part of that water to the Tribe. And if the United States is merely changing the use of its own water, why is it not proceeding under *Orr Ditch* itself and filing appropriate applications with the State Engineer pursuant to Nevada law? *See United States* v. *Alpine Land & Reservoir Co.*, 697 F.2d 851, 857-858 (9th Cir. 1983).

[7] They decreed that "* * * by implication and by relation as of the date of December 8, 1859, a reasonable amount of the water of

The United States was also awarded specific amounts of water for the irrigation of "lands on the Newlands Project, * * * [and] for supplying the inhabitants of cities and towns on the project * * *." Nev. App. 59a. Under both *Ickes* v. *Fox*, 300 U.S. 82 (1937), and *United States* v. *Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 879-881 (D. Nev. 1980), the Project farmers became actual owners of the water appurtenant to their land.[8] The United States is simply a lienholder insofar as these farmers are concerned, with no right to take the water away from them. As stated by the Ninth Circuit in *Alpine*, this is water "guaranteed the Newlands Project farmers under the Orr Ditch decree." 697 F.2d at 857. In *Alpine*, the United States made essentially the same argument it makes here—that its contracts with the individual Newlands farmers controlled the rights of those farmers—and the argument was rejected. *Id.* at 853.[9] Instead, the court there held that "the Project farmers' rights * * * vested in 1902" (*id.* at 855), the date when the Project was constructed and the same date of priority established in the *Orr Ditch* Final Decree. Nev. App. 59a.

The United States points to language in the Final Decree allowing "persons" whose rights were adjudicated

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the Truckee River, *which belonged to the United States* under the cession of territory by Mexico in 1848 * * *, *became reserved for the needs of the Indians* on the reservation." Nev. App. 13a, 57a; emphasis added.

[8] The Tribe does not even cite or acknowledge *Ickes* v. *Fox*. The United States contends that under *Ickes*, the farmers' rights do not vest until their "repayment and other obligations under the contract have been satisfied." U.S. 28. This is a complete misreading of *Ickes*. As for the *Alpine* ruling on this point, the United States chose not to appeal it and therefore cannot contest it here.

[9] The reliance of the United States upon its contracts with individual Newlands farmers is, in any event, a red herring. These contracts *preceded* the *Orr Ditch* Final Decree, and yet the United States did not use them to persuade the *Orr Ditch* court to award less than the amounts allocated to Newlands in that case.

to change the place, means, manner or purpose of use of the water adjudicated to them. Even assuming that the United States is a person to whom water was adjudicated, this provision is subject to the specific proviso that such changes cannot be made when they would result in injury to the rights of others. Nev. App. 149a.[10] It is absurd to suggest that after the District Court made detailed findings as to precisely how much water could be used for the Project and how much for the Reservation, half of the water allocated to the Project could thereafter be taken away *under the Final Decree* and given to the Reservation.[11]

3. *Arizona* v. *California*

The remaining principal arguments made by the United States and the Tribe in this case have now been decided adversely to them by this Court's decision within the last two weeks in *Arizona* v. *California*, 51 U.S.L.W. 4325 (U.S. Mar. 30, 1983). The United States and the Indian Tribes claimed in that case, as here, that the Indians were awarded less water in the original Decree than they were entitled to. Even though the application for more water was made in the same case, the Court rejected it and applied res judicata principles. And in doing so, the Court observed: "There is no question that if these claims were presented in a different proceeding, a court would be without power to reopen the matter due to the operation of res judicata." *Id.* at 4328. Not only is that the situation here, but this is a far stronger case for the application of res judicata than *Arizona* was in several important respects.

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[10] Moreover, as the Ninth Circuit made clear in *Alpine*, any change in place of use of Newlands water must be accomplished *within* the Project. 697 F.2d at 857-858.

[11] Perhaps it is with possibilities in mind such as here suggested by the United States that 18 States (including four outside the West) and several major municipal centers have filed *amicus* briefs supporting Nevada in this case.

First, the Decree in that case allowed parties to apply for amendment or for further relief. The Final Decree in *Orr Ditch* contained no such provision. Its awards were intended to apply for all time. Secondly, this Court deliberately left certain matters unanswered in its Decree in *Arizona*, so that arguably the uncertainties rendered the Decree interlocutory and subject to relitigation. *Id.* at 4329 n.12. Here, the *Orr Ditch* Final Decree contained no open provisions or unanswered questions. Third, the problem in *Arizona* may have arisen because of a Governmental error, or mistake, in calculating irrigable acreage for the Indians. Here, the evidence points to a deliberate and reasoned conclusion by the Government that the primary purpose of the Reservation was to convert the Indians from their nomadic habits and into agricultural pursuits. Awarding them water for a fishery as opposed to irrigation would have defeated that purpose.[12] Finally, detrimental reliance was bitterly contested in *Arizona*. In the instant case, the evidence is overwhelming, and the courts below found, that billions of dollars have been spent and whole areas have been built in reliance on the *Orr Ditch* Final Decree.

The other principal argument made by the United States and the Tribe in this case—relating to an alleged conflict of interest—is also answered by *Arizona*.[13] The

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[12] It is argued that in its reference to fishing, the Amended Complaint in *Orr Ditch* was alluding to the Government's purpose in establishing the Pyramid Lake Reservation rather than to its purpose in instituting *Orr Ditch*. *E.g.*, Tribe 9 n.4. But the two are the same. The Government brought *Orr Ditch* in part to establish the Indians' *Winters* rights, which in turn depended upon the primary purposes of the Reservation. If a fishery was relevant to the purpose of the Reservation, it was equally relevant to the purpose of the lawsuit.

[13] It is difficult to follow the Tribe's argument in regard to the alleged conflict of interest. On the one hand, the Tribe vigorously asserts that the Government's conflict was so serious as to deny the Tribe due process. On the other hand, the Tribe contends that it makes no difference why a fishery right was not asserted on its

doctrine of *Heckman* v. *United States*, 224 U.S. 413 (1912) (a case which has been cited at least 35 times with apparent approval by this Court), was unqualifiedly reaffirmed in *Arizona*: "As a fiduciary, the United States had full authority to bring the *Winters* rights claims for the Indians and bind them in the litigation." 51 U.S.L.W. at 4331. The Government's "interest in securing water rights for other federal property"— the same basis for the alleged conflict here—was found to be no ground for failing to apply res judicata principles. "The United States often represents varied interests in litigation involving water rights * * *." *Id.*[14]

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behalf—whether through "negligence, inadvertence, mistake, or deliberate and willful misconduct." Tribe's Cross-Pet. Brief at 43. Under this latter reasoning, a conflict of interest would have no relevance. *Arizona* v. *California* is a complete answer in any event.

[14] The adversity required for res judicata differs from a conflict of interest. As we have shown, diverse federal interests in a given body of water necessarily are adverse for purposes of res judicata. Nev. (No. 81-2245) Br. 28-36. The Court in *Arizona* recognized, by contrast, that an "actual conflict of interest" exists only if establishment of one federal reserved water right would "diminish" another. 51 U.S.L.W. at 4331.

Thus, in *Orr Ditch*, although the interests of the Project and the Tribe were adverse, the United States had no actual conflict of interest. At that time the Government believed that only a small amount of water was necessary to protect the fish in Pyramid Lake. Nev. (No. 81-2245) Br. 13 & n.15. If the United States had litigated a fishery claim for the Reservation in addition to its claims for water for irrigation of the Reservation and the Project, the total federal claims would not have exceeded the water supply of the Truckee River. The federal claims therefore were not "in direct competition" (51 U.S.L.W. at 4331) and did not give rise to a conflict of interest.

It should be noted that while the Tribe argues that the alleged conflict rose to the level of a due process violation, the United States studiously avoids any such contention. And even the cases cited by the United States involved fraud or collusion—a state of affairs that again the United States does not argue obtained here. No

4. Improper Splitting of Cause of Action

The United States and the Tribe contend that even though the United States was seeking a *Winters* right for the Reservation in *Orr Ditch*, it was free to press only the irrigation portion of this right, in effect split out the fishery portion, and seek the fishery right at a later date. Putting aside the complete novelty of such an approach in a *Winters* case and the fact that its entire concept was repudiated in *Arizona*, there is only one

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matter how characterized, the "conflict" arose solely from the same diversity of interests which this Court discounted in *Arizona*.

It is highly significant that the Tribe, while claiming a denial of due process in regard to fishery, is quick to assert that the Government adequately represented it in regard to irrigation. Tribe 21 n.13. In other words, the United States "assumed a fully adversary position against TCID" with respect to agricultural rights but not with respect to fishery rights. *Id.* If the United States truly did not have the interests of the Indians at heart, one wonders why it fought TCID at all.

Similarly, the Indians' only response to our point that the United States was successful in *increasing* the Indians' allocation between the TRO and the Final Decree is that if it had tried harder, the Government could have obtained an even larger increase than it did. Tribe 20-23 n.13.

Finally, by representing in this case both named interests such as the Stillwater Wildlife Refuge (*see* U.S. 3 n.2), and an unnamed interest like the Naval Base at Fallon, both of which would be harmed by a diversion of water from Newlands, the United States has the same kind of conflict here that it says was impermissible in *Orr Ditch*. In addition, the States' participation in virtually all suits as parens partiae would be thrown in doubt by an adverse ruling on the alleged conflict, since various entities within these States often have divergent interests at stake in such suits.

The United States and the Tribe also advert in footnotes to alleged conflicts of interest on the part of the *Orr Ditch* trial judge and one of the attorneys representing the United States. U.S. 39 n.31; Tribe 13 n.9. But the facts about these "conflicts" were known by all parties, including the United States, for years during the pendency of the *Orr Ditch* case, and no objection was made on the record in that case—or until today in this one. The point, if ever valid, has been waived.

proper way of so splitting a cause of action. Under precepts of fairness and all applicable strictures, a cause of action can thus be split only with proper notice to all involved that certain rights are being reserved—or with the other parties' consent. *See Restatement of Judgments* § 62 (1942); *Restatement (Second) of Judgments* § 26(a)-(b) (1982). Here, our opponents are attempting to blindside the Newlands farmers—and the Tribe, the *Orr Ditch* defendants as well—without notice of any kind in *Orr Ditch* that an alleged fishery right was being reserved for future litigation.

5. The Remedy of Compensation

Even if our opponents were correct in their view of *Orr Ditch*—which we strenuously deny—the remedy would not be to take water from innocent third parties almost 40 years after a "final" Decree. The remedy is compensation. That is why the Indians Claims Commission was formed—to make monetary awards in situations in which it would grossly violate the rights of others to grant equitable relief. 25 U.S.C. § 70a (1976) (now repealed); *see Arizona* v. *California*, 51 U.S.L.W. at 4331 n.20; *United States* v. *Sioux Nation*, 448 U.S. 371 (1980); *see also* 28 U.S.C. § 1505 (1976).[15]

6. Nevada's Standing

Unlike the United States, which never mentions the point, the Tribe contends that the State of Nevada is improperly before the Court. Tribe 32. The District Court granted the State's motion to dismiss Nevada as parens patriae when it appeared that the United States and the Tribe would attempt to use any judgment against Nevada as binding on citizens who had not been served. JA 207-210. Thereafter, Nevada appeared in its quasi-sovereign capacity. When the Tribe objected (JA 211), the District

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[15] The Indian Claims Commission has already awarded the Tribe $8 million based upon the loss of water for an alleged fishing right at Pyramid Lake. JA 488.

Court specifically ruled that the State could properly present quasi-sovereign interests in the case. JA 248-50; *see also* JA 155-156. The Tribe did not appeal that ruling, Nevada subsequently appeared in the Court of Appeals making the same quasi-sovereign arguments it is making here, its standing was not challenged, and its position in the case was not made a ground for the Tribe's cross-petition. Nevada's standing, therefore, is not properly an issue. And even if it were, the State is clearly carrying out its legitimate role of representing the interests of the people of Nevada as a whole. *See Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 50 U.S.L.W. 5035 (U.S. July 1, 1982).

7. The Fundamental Questions

After the hundreds of pages of briefs in these cases have been dissected, the facts relating back over 125 years reviewed, and the fine points of the law analyzed, this Court must ask itself these very practical, commonsense questions:

(a) Would the United States have sought an all-inclusive, comprehensive, quiet title, water rights adjudication with the object of conclusively settling each and every claim to the Truckee River and thus avoiding a multiplicity of lawsuits if it had foreseen that it and the Tribe it was representing would later claim still another right to Truckee River water?

(b) Would the multitude of defendants in *Orr Ditch* have litigated for 31 years and accepted the Final Decree if it had entered their minds that a large claim superior to theirs was lurking in the background, outside the case, capable of being asserted at any time in the future?

(c) Would the *Orr Ditch* court have entered a Final Decree purporting to establish the rights to the waters of the Truckee River, not just for "parties" but for each and every claimant of Truckee River water, then or in the future, if the court had thought that one

of the most significant claims for that water was not included in the Decree?

(d) Would Western Nevada and its citizens have spent billions of dollars building and developing cities, towns, schools, farms and the like—their very livelihood—on the basis of water awarded in the Final Decree if they had known that large amounts of water having an impact on them could be diverted at any time—no matter how far into the future?

(e) Would the Newlands Project ever have been authorized by Congress and built from scratch by thousands of farmers if anyone had conceived that more than 80 years later half of the Project's water would be taken away for a previously unasserted claim?

(f) Would Congress and the Indians Claims Commission have awarded the Tribe millions of dollars in compensation for damage to a fishery if either had believed that the Tribe could, at any time, bypass the *Orr Ditch* Final Decree and obtain additional water in order to rehabilitate that fishery?

The answers to these questions are obvious. An award of a fishery water right in 1983 would be a rewriting of history and in derogation of rights long thought to be in repose through judicial decree.[16]

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[16] How severely this repose would be disturbed is illustrated by the length and complexity of proceedings that would follow an affirmance by this Court of the Ninth Circuit's ruling as to TCID. Because this case was bifurcated for trial solely on the res judicata and collateral estoppel issues, the defendants still have numerous other defenses, which they have never had an opportunity to present, including the one that the United States and the Tribe are barred by the very wording of the *Orr Ditch* Final Decree from bringing this action ("The parties * * * and all persons claiming by, through or under them * * * are * * * hereby forever enjoined * * * from asserting or claiming any rights in or to the waters of the Truckee River * * * except the rights specified * * * by this decree * * *"—Nev. App. 145a). For other defenses that would be raised, such as laches, see JA 64-69, 94-108, 118-127.

CONCLUSION

For the foregoing reasons and the reasons given in Nevada's opening brief, the judgment of the Ninth Circuit Court of Appeals should be reversed with respect to TCID, and in all other respects affirmed.

Respectfully submitted,

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APPENDIX A

[Temporary Restraining Order, see Nev. App. 12a; emphasis added.]

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF NEVADA

In Equity, Docket No. A3

THE UNITED STATES OF AMERICA,
Plaintiff

vs.

(A) Daisy Adams, successor to George Imes and Andrew Drake (435); Henry Brewster Adams and Edna R. Adams (380), Aguerrebere and Marinelarina, successors to Coopers (66) E. R. Albee and Leora Albee, successors to William Pierson (638); * * *

* * * *

(P) * * * Mrs. E. A. Proctor (549); S. J. Prose, succeeded by Charles E. Catoir and Joe P. Strathman (397); John H. Prosole, intervenor (85); Louis Prosole, intervenor (87); R. L. Pryor, successor to N. T. Neilson (563); *Pyramid Lake Reservation (see United States).*

(Q) G. B. Questa, succeeded by Mark L. Yori (302-303-404); Guilio Quilici, of successors to Walter Berry (470-471); R. Quilici and G. Panelli, successors to L. Garavanta (625); Peter Quillici, intervenor, successor to G. S. Denton and G. Ricci (17); Abbie W. Quinn, intervenor, successor to Nancy J. Laughton (103); E. F. Questa (74).

* * * *

(U) Lucy M. Ulyatt, succeeded by Alex Crotta (576-577); *United States [Newlands Project, formerly Truckee-Carson Project; Derby Canal and Lahanton Reservoir (3), Lake Tahoe (4), Pyramid Lake Indian Reservation*

(1-2); Reno Indian Colony (499)]; University of Nevada (281-384); University Stock Farm (264); Unknown Owners (28-33-43); Mary F. Upson (301); * * *

* * * *

It is hereby ordered that all persons herein named as owners, grantors and successors be made and considered parties to this action and that all parties herein named as grantees or successors be substituted for their respective predecessors with all the rights of their grantors and respective predecessors.

APPENDIX B

[Final Decree, see Nev. App. 17a; emphasis added.]

IN THE DISTRICT COURT OF THE
UNITED STATES IN AND FOR
THE DISTRICT OF NEVADA

In Equity, Docket No. A3

THE UNITED STATES OF AMERICA,
Plaintiff

vs.

(A) Daisy Adams, successor to George Imes and Andrew Drake (435); Henry Brewster Adams and Edna R. Adams (380), Aguerrebere and Marinelarina, successors to Coopers (66) E. R. Albee and Leora Albee, successors to William Pierson (638); * * *

* * * *

(P) * * * Mrs. E. A. Proctor (549); S. J. Prose, succeeded by Charles E. Catoir and Joe P. Strathman (397); John H. Prosole, intervenor (85); Louis Prosole, intervenor (87); R. L. Pryor, successor to N. T. Neilson (563); *Pyramid Lake Reservation* (*see United States*).

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(U) Lucy M. Ulyatt, succeeded by Alex Crotta (576-577); *United States* [*Newlands Project, formerly Truckee-*

Carson Project; Derby Canal and Lahanton Reservoir (3), Lake Tahoe (4), Pyramid Lake Indian Reservation (1-2); Reno Indian Colony (499)]; University of Nevada (281-384); University Stock Farm (264); Unknown Owners (28-33-43); Mary F. Upson (301).

* * * *

It is hereby ordered that all persons herein named as owners, grantors and successors be made and considered parties to this action and that all parties herein named as grantees or successors be substituted for their respective predecessors with all the rights of their grantors and respective predecessors.